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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNON LAVELLE DURONTE, Defendant and Appellant.	B209915 (Los Angeles County Super. Ct. No. NA044762)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

Following his June 2000 no contest plea to first degree residential burglary (Pen. Code, § 459),[1] defendant and appellant Kennon Lavelle Duronte was granted probation. After numerous revocations, extensions, and reinstatements, probation was eventually terminated in July 2008 and the trial court imposed the upper term of six years in prison. Duronte contends imposition of the upper term was improper because: (1) the trial court violated California Rules of Court, rule 4.435 when it based his sentence on events that occurred subsequent to the original grant of probation, i.e., his poor performance on probation; (2) the trial court abused its discretion by failing to consider mitigating factors as they existed at the time of the original grant of probation; (3) the trial court committed *Cunningham*[2] error by imposing an upper term sentence based on facts that were not found true by a jury beyond a reasonable doubt; (4) application of the 2007 amendments to the Determinate Sentencing Law (DSL) to his sentence violated ex post facto principles; and (5) application of the 2007 amendments to the DSL violated his contract clause rights.[3] Discerning no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The crime and plea.*[4]

In May 2000, when he was 20 years old, Duronte entered an inhabited home with the intent to commit larceny. A citizen reported the crime in progress to police, who arrived on the scene and discovered Duronte inside the house and a co-defendant outside.

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1 All further undesignated statutory references are to the Penal Code.

2 *Cunningham v. California* (2007) 549 U.S. 270.

3 In his opening brief, Duronte argued that the abstract of judgment should be modified to correctly reflect his presentence custody credits. In his reply brief, Duronte advises that, upon his motion, the trial court has now corrected the abstract of judgment as requested. We take judicial notice of the trial court's minute order of January 13, 2009, which moots Duronte's contention on appeal. (Evid. Code, § 452.)

4 Because the matter did not proceed to trial, we glean the facts from the probation report.

The home had been ransacked. Several items from the home had been placed in a large nylon bag next to the front door.

In June 2000, as part of a negotiated disposition occurring prior to the preliminary hearing, Duronte pleaded no contest to first degree residential burglary (§ 459). Sentence was suspended and Duronte was placed on three years formal probation on condition that, inter alia, he serve 180 days in jail, pay a $200 restitution fine, and pay restitution to the victims in an amount and manner directed by the probation officer. A restitution fine of $5,426.69 was ultimately imposed.

2. *Duronte's performance on probation.*

During the ensuing years, Duronte's probation was repeatedly revoked and reinstated. In September 2000, deputies conducting a probation search at Duronte's home discovered live ammunition in Duronte's bedroom, and three rifles, a BB rifle, and more ammunition in the house within Duronte's easy access. At a probation violation hearing, Duronte admitted the violation. Probation was revoked, modified to add a 180-day jail term, and reinstated.

In January 2003, a large balance was still remaining on the restitution award Duronte had been ordered to pay. At a probation violation hearing, Duronte stipulated to violating probation. Probation was continued on the same terms and conditions, and extended to June 10, 2004.

In March 2004, another probation violation hearing was held because Duronte had still failed to make timely restitution payments. He was found to be in violation of probation. Probation was continued on the same terms and conditions and extended to June 10, 2005.

In February 2005, a probation violation report was filed noting that Duronte had failed to report to his probation officer in May, September, and December of 2004, and was not making timely restitution payments. Probation was continued on the same terms and conditions.

In March 2005, Duronte stipulated that he was in violation of probation for failing to make restitution payments. Probation was revoked and the matter was continued so a supplemental probation report could be prepared. At the probation violation hearing in June 2005, the court reinstated and continued probation, and extended it to expire on June 22, 2006, or whenever restitution was paid in full. Duronte was also ordered to pay $500 to the probation department.

In December 2005, a probation report stated that Duronte had failed to report in July, August, and September 2005, and was not making timely payments. At the probation violation hearing, the court ordered a supplemental probation report. Duronte remained free on his own recognizance. In April 2006, when the case was called for hearing, Duronte was not present in court. Probation was revoked and a bench warrant was issued.

In May 2006, Duronte appeared for the probation hearing. The court found him in violation, and revoked and reinstated probation, continuing on the same terms and conditions until June 22, 2008.

In April 2008, Duronte failed to appear at a probation violation hearing. Probation was revoked and a bench warrant issued. Later that afternoon, after being picked up on the bench warrant, Duronte appeared on the bench warrant hearing. The court ordered probation to remain revoked, ordered a supplemental probation report, and scheduled a revocation hearing.

3. *Termination of probation.*

The probation revocation hearing transpired on July 10, 2008. Deputy Probation Officer Maria Hernandez-Clark, Duronte's probation officer since 2004, testified that Duronte had failed to report since August 2007 and had not made restitution payments since June 2007. Duronte was supposed to check in at an automated kiosk every month, where a biometric scanner would scan his fingerprint. The probation officer acknowledged that the machines sometimes malfunctioned. However, when a machine did not work, an "incomplete session" was reported into the probation system.

Duronte testified that he had tried to check in at the probation kiosk numerous times, but it had failed to read his fingerprint. On each occasion, he waited to speak to the "officer of the day." He gave the officer a "white office slip," and she told him she would "put it in the computer." The officer did not give him any paperwork. He admitted failing to make restitution payments. He had not been arrested since 2000.

In rebuttal, the probation officer testified that when a kiosk check-in session was incomplete, the officer of the day would nonetheless give a probationer credit for checking in. On several occasions, including in August 2007, Duronte had been given credit through the officer of the day.

The trial court concluded Duronte was in violation of probation for failure to report since September 2007. The court stated, "I don't believe Mr. Duronte is being truthful. He has had a terrible record on probation. He indicates that he violated probation once, [in] the same year that he was sentenced, June 12, 2000, when he got 180 days." The court briefly recapped Duronte's history of probation violations and stated, "[h]e is not suitable." The court revoked and terminated probation and sentenced Duronte to the high term of six years for the burglary. It explained, "The basis of that is that defendant has performed horribly while he was on probation."

DISCUSSION

1. *The trial court did not violate California Rules of Court, rule 4.435 by imposing the upper term based on Duronte's poor performance on probation; any error was harmless.*

Duronte contends the trial court abused its discretion and violated rule 4.435 when it imposed the upper term based on events occurring after the initial grant of probation. We disagree.

Preliminarily, the People point out that the waiver doctrine applies to claims that a trial court failed to properly make or articulate its discretionary sentencing choices. (*People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Kelley* (1997) 52 Cal.App.4th 568, 582.) Here, Duronte never objected to the trial court's reliance on his probation performance as an aggravating factor, and has therefore forfeited this claim on appeal.

Nevertheless, because he contends his counsel was ineffective for failing to raise the issue below, we consider the merits of the claim.

California Rules of Court, rule 4.435(b)(1), formerly rule 435(b)(1), provides in pertinent part that when a court imposes sentence after revoking probation, "[t]he length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found." The rule "clearly prohibits the superior court from considering events subsequent to the grant of probation when determining the length of a prison term upon revocation of probation." (*People v. Goldberg* (1983) 148 Cal.App.3d 1160, 1163, fn. 2.) The "spirit and purpose of the rule" is to "preclude the possibility that a defendant's bad acts while on probation" will influence his sentence upon revocation of probation. (*Id.* at p. 1163.)

However, California Rules of Court, rule 4.435 does *not* preclude a sentencing court's consideration of events occurring between the initial grant of probation and a *reinstatement* of probation. (*People v. Harris* (1990) 226 Cal.App.3d 141, 145.) In *Harris,* the defendant pleaded guilty to possessing cocaine and was placed on probation. His probation was revoked and reinstated. When probation was eventually terminated and Harris was sentenced, the court rejected his bid for a mitigated term, noting that he had performed unsatisfactorily on probation. On appeal, Harris argued that the court had violated former rule 435(b)(1) by considering circumstances occurring after the initial grant of probation. *Harris* rejected this argument, reasoning, "We conclude that the rule allows consideration of circumstances preceding a *reinstatement* of probation. The rule bars considering events subsequent to 'the time probation was granted . . . .' It does not specifically address a situation where, as here, probation is granted, revoked and then, as part of a negotiated disposition, reinstated on modified terms. . . . [R]einstating probation on modified terms appears to be a new *grant* of probation within the meaning of the rules. . . . Thus, nothing in the language of the rules bars considering events predating a reinstatement of probation." (*People v. Harris, supra,* at pp. 145-146; see also *People v.*

Downey (2000) 82 Cal.App.4th 899, 917 [*Harris* permits consideration of a defendant's performance on probation prior to a reinstatement of probation].)

Harris further explained that, to hold otherwise would "seriously impede a court's flexibility to deal effectively with the offender who, granted the 'clemency and grace' of probation in the hopes of achieving rehabilitation [citation], proves unable to abide by the conditions of that liberty the first time out. Allowing an offender to fail multiple grants of probation with absolute impunity under [former] rule 435(b)(1) would discourage a court from ever reinstating probation. That would further crowd prisons and tend to sacrifice probation's goals of supervised reform and rehabilitation [citation]." (*People v. Harris, supra,* 226 Cal.App.3d at p. 147.)

Here, the last reinstatement of probation occurred in May 2006. Applying *Harris*, the trial court acted within its discretion by considering Duronte's performance on probation from the initial grant in June 2000 until the final reinstatement in May 2006. The trial court's comments at sentencing indicated it may have considered Duronte's performance both before and after May 2006. The court stated it did not believe Duronte's testimony regarding his attempts to check in at a probation kiosk since August 2007. The court then summarized Duronte's probation history, beginning in September 2000 and ending with April 18, 2008.[5] To the extent the trial court considered Duronte's performance on probation after May 2006, it erred.

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5 "He got violated on September 22nd, 2000, for doing the same thing, abandoning his probation, not reporting. [¶] He was reinstated October 25. [¶] January 23rd, 2003, his probation was again revoked. Defendant admitted to [a probation] violation. [¶] March 19, 2004, probation was again revoked. [¶] March 16, 2005, he was picked up, reinstated, after admission of violation. [¶] December 1, 2005, his probation was again revoked. [¶] January 5, 2006, after admission, probation was again reinstated. [¶] . . . [¶] April [5] of 2006, probation was again revoked, only to be reinstated on May 2nd, 2006, after admission. [¶] Then finally, April 18, 2008. [¶] He is not suitable." The court also noted that since 2004, the probation officer had submitted seven separate violations.

However, any error in this regard was harmless, because it is not reasonably probable that Duronte would have received a more favorable sentence had the court limited its consideration to events occurring before May 2006. (See *People v. Downey, supra,* 82 Cal.App.4th at p. 917; *People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper"]; *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318-1319.) As the People point out, the court's comments referred "almost entirely" to events occurring after the initial grant of probation but before the final reinstatement of probation in May 2006. Duronte had performed unsuccessfully on probation for approximately six years prior to May 2006. During those years, he did not report to his probation officer at least six times and failed to make restitution as required, the same type of conduct occurring after May 2006. In addition, in 2000 he was found in possession of ammunition and in proximity to firearms. Under these circumstances, it is not reasonably probable that the trial court would have imposed a lesser sentence had it expressly excluded consideration of post-May 2006 events.

Duronte urges that *Harris* was wrongly decided. He suggests that *Harris*'s holding ignores the plain language of the rule, which "unequivocally" provides that a sentence must be based only on the circumstances existing at the time probation was granted and does not allow for an exception in cases where probation was reinstated. We disagree. As *Harris* suggested, the phrase " 'at the time probation was granted' " is ambiguous where probation has been revoked and reinstated. (See *People v. Harris, supra,* 226 Cal.App.3d at p. 145.) Thus, Duronte's contention that *Harris* ignored the plain language of the rule is not persuasive.

We are likewise unpersuaded by Duronte's argument that *Harris*'s rationale is flawed. Duronte argues that, contrary to *Harris*'s reasoning, limiting California Rules of Court, rule 4.435 to events occurring before the initial grant of probation would not allow offenders to fail probation with impunity. Duronte points out that trial courts have a

number of means, other than termination of probation, at their disposal to punish offenders who fail on probation. In his case, for example, the probationary period was extended and an additional jail term was imposed. We are not convinced. *Harris* has been good law since 1990, and its reasoning is sound. We decline Duronte's invitation to reject its holding in favor of an inflexible standard not necessarily required by the plain language of the statute.

Because any error was harmless, we necessarily reject Duronte's ineffective assistance claim. To establish a meritorious claim of constitutionally ineffective assistance of counsel, an appellant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. If the defendant makes an insufficient showing on either component, the ineffective assistance claim fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) For the reasons we have set forth *ante,* Duronte cannot demonstrate prejudice. As we have explained, the trial court's reliance on Duronte's probation performance prior to May 2006 was proper; to the extent the court relied on his performance after that date, its error was harmless.

2. *The record does not affirmatively demonstrate that the trial court failed to consider mitigating factors in existence at the time probation was initially granted.*

Duronte also urges that the trial court abused its discretion by failing to take into account mitigating factors found to exist by the trial court that imposed probation in 2000.

Section 462 provides that probation shall not be granted to persons convicted of the burglary of an inhabited dwelling house, the crime at issue here, except in unusual cases where probation would serve the interests of justice. If a trial court grants probation under these circumstances, it must "specify the reason or reasons for that order on the court record." (§ 462, subds. (a), (b); see also Cal. Rules of Court, rule 4.433(c)(5)

[when a trial court imposes probation, it must state "the terms thereof and giv[e] reasons for those matters for which reasons are required by law"].) When originally granting probation in 2000, the trial court stated: "I understand this is a presumptive state prison case. However, the court is going to place each defendant on probation based upon their, either lack or minimal prior record, and an early disposition."

California Rules of Court, rule 4.435 provides that when a prison term is imposed after termination of probation, if the sentence was previously suspended "the judge must impose judgment and sentence *after considering any findings previously made* and hearing and determining the matters enumerated in rule 4.433(c)." (Cal. Rules of Court, rule 4.435(b)(1), italics added.) Duronte argues that the judge who sentenced him to prison in 2008 was required to consider the previous court's findings that he had no criminal record and had "acknowledged his wrongdoing at an early stage of the proceedings." (See *People v. Goldberg, supra,* 148 Cal.App.3d at pp. 1162-1163; Cal. Rules of Court, rule 4.423(b)(1) & (3) [lack of a significant criminal record, and the fact a defendant "voluntarily acknowledged wrongdoing . . . at an early stage of the criminal process" are mitigating factors].) The record reflects that when Duronte was sentenced in 2008, the court made no reference to the mitigating circumstances which had influenced the original decision to grant probation. Duronte argues that, by failing to consider the favorable findings made when probation was granted, the 2008 court violated rule 4.435(b). (See *People v. Goldberg, supra,* at pp. 1162-1163 [concluding that court's failure to consider previous findings may have been prejudicial, and remanding for a new sentencing hearing, where it was "at least questionable" whether aggravating circumstances outweighed mitigating circumstances at the time probation was granted].)

As noted *ante,* the waiver doctrine applies to claims that a trial court failed to properly make or articulate its discretionary sentencing choices. (*People v. Scott, supra,* 9 Cal.4th at p. 353; *People v. Kelley, supra,* 52 Cal.App.4th at p. 582.) Duronte never objected to the trial court's purported failure to consider mitigating circumstances, and accordingly he has forfeited this claim on appeal. Because he contends his counsel was

ineffective for failing to raise the issue below, however, we consider the merits of the claim.

A remand for resentencing is required when the court fails to consider relevant mitigating factors. (*People v. Strunk* (1995) 31 Cal.App.4th 265, 273-275; *People v. Kelley, supra,* 52 Cal.App.4th at p. 582.) The court is presumed to have considered all relevant factors unless the record affirmatively shows the contrary. (Cal. Rules of Court, rule 4.409; *People v. Weaver, supra,* 149 Cal.App.4th at p. 1318 ["unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice"]; *People v. Myers* (1999) 69 Cal.App.4th 305, 310; *People v. Kelley, supra,* at p. 582; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836.)

Here, the record contains no affirmative indication that the trial court failed to consider the cited mitigating factors. Prior to the probation violation hearing, the judge ordered a supplemental probation report. In addition to that report, the record contains the original probation report, prepared in 2000, which states that Duronte had no prior record. We presume that this report was available to and was reviewed by the trial court. The fact the court focused its explanatory comments on a particular aspect–i.e., appellant's performance on probation–"does not mean that it considered only that factor." (*People v. Myers, supra,* 69 Cal.App.4th at p. 310; see also *People v. Weaver, supra,* 149 Cal.App.4th at pp. 1317-1318 [presuming trial court was aware of, and considered, mitigating circumstances despite the fact that neither the court nor the sentencing documents expressly referred to them].) Under these circumstances, we discern no reversible error.

Duronte additionally contends his counsel was ineffective for failing to call the trial court's attention to the aforementioned mitigating factors. He correctly points out that "a defense attorney who fails to adequately understand the available sentencing alternatives, promote their proper application, or pursue the most advantageous disposition for his client may be found incompetent." (*People v. Scott, supra,* 9 Cal.4th

at p. 351.) Assuming arguendo that counsel lacked a tactical reason for his failure to make the suggested arguments, and that his performance in this regard fell below an objective standard, Duronte has nonetheless failed to establish prejudice. As noted, the original probation report clearly stated that Duronte had no other criminal history, and we presume the court was aware of this fact. Moreover, the trial court was unlikely to attach great weight to the fact Duronte pleaded early in the proceedings, prior to the preliminary hearing, given that his plea was apparently made as part of a plea bargain. (See *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1318 ["a guilty plea resulting from a plea bargain is not a sufficient acknowledgment of guilt to constitute a mitigating factor since the admission is only to receive a benefit from the prosecution"]; *People v. Burg* (1981) 120 Cal.App.3d 304, 306-307.) "A reviewing court is entitled to presume the sentencing court properly exercised its discretion in imposing sentence absent evidence to the contrary." (*People v. Montano* (1992) 6 Cal.App.4th 118, 121.) Accordingly, because Duronte has failed to establish prejudice, his ineffective assistance claim fails. (See *People v. Lopez, supra,* 42 Cal.4th at p. 966.)

3. *Imposition of the upper term was constitutionally permissible.*

a. *Imposition of an upper term sentence did not violate Duronte's jury trial rights.*

Duronte argues that, because the court imposed the upper term based on facts that were neither admitted nor found true by a jury, imposition of the upper term violated his Sixth and Fourteenth Amendment rights to a jury trial and due process. (*Blakely v. Washington* (2004) 542 U.S. 296; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Cunningham v. California*, *supra*, 549 U.S. 270.) We discern no error.

In *Apprendi v. New Jersey*, *supra*, 530 U.S. at page 490, the United States Supreme Court held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. In *Cunningham*, the court held that the version of California's determinate sentencing law then in effect violated a defendant's federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments by assigning to the trial judge, rather than the jury, the authority to make factual findings

that subject a defendant to the possibility of an upper term sentence. (*Cunningham v. California, supra*, 549 U.S. at pp. 292-293; *People v. Black* (2007) 41 Cal.4th 799, 805; *People v. Sandoval* (2007) 41 Cal.4th 825, 831-832.) When a finding of poor performance on probation can be established only by facts other than the defendant's prior convictions, the right to a jury trial applies to such factual determinations. (*People v. Towne* (2008) 44 Cal.4th 63, 82-83.)

In the wake of *Cunningham*, "[t]he California Legislature quickly responded" by amending the law to rectify the constitutional defects identified in *Cunningham*. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.) "Senate Bill No. 40 (2007-2008 Reg. Sess.) (Senate Bill 40) amended section 1170 in response to *Cunningham*'s suggestion that California could comply with the federal jury-trial constitutional guarantee while still retaining determinate sentencing, by allowing trial judges broad discretion in selecting a term within a statutory range, thereby eliminating the requirement of a judge-found factual finding to impose an upper term. [Citations.] Senate Bill 40 amended section 1170 so that (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states. As amended, section 1170 now provides as pertinent: 'When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . .' (§ 1170, subd. (b).) This amended version of section 1170 became effective on March 30, 2007. (Stats. 2007, ch. 3, § 2.)" (*People v. Wilson, supra*, at p. 992; *People v. Sandoval, supra*, 41 Cal.4th at p. 836, fn. 2.) In *People v. Sandoval, supra*, 41 Cal.4th at pages 843-852, the California Supreme Court judicially reformed the former DSL to conform to the new law. (*People v. Miller* (2008) 164 Cal.App.4th 653, 669.)

Senate Bill No. 40's amendment to the DSL, and the judicial reformation of the statute, cured the constitutional defects identified by *Cunningham*. (*People v. Wilson*, *supra*, 164 Cal.App.4th at p. 992.) Duronte was sentenced on July 10, 2008, after the effective date of the amendment. The trial court stated its reasons for imposition of the upper term, as described above. Accordingly, "[t]he trial court's sentencing of defendant in compliance with the requirements of amended section 1170, subdivision (b), did not violate defendant's federal constitutional rights under *Apprendi*, *Blakely*, and *Cunningham*." (*People v. Wilson*, *supra*, at p. 992.)

b. *Application of the amended DSL to Duronte did not violate ex post facto principles.*

Duronte, however, complains that application of the amended DSL to him violated ex post facto principles. He asserts that when his crime was committed in 2000, the maximum sentence that could have been imposed, absent a finding of aggravating facts, was the midterm. Because no aggravating factors existed at that time, he posits, the amendment to the DSL amounted to a constructive increase in the sentence for his crime that ran afoul of ex post facto principles. (See *Miller v. Florida* (1987) 482 U.S. 423, 435-436.) He urges that the 2007 amendments "made it easier for the sentencing judge to select the upper term and thus placed a more onerous burden on appellant, constructively increasing both his potential . . . and actual sentence."

As Duronte acknowledges, *People v. Sandoval*, *supra*, 41 Cal.4th 825, while not directly deciding the ex post facto issue presented here, concluded that application on resentencing of the judicially reformed DSL to crimes committed prior to its effective date, does not implicate ex post facto or due process concerns. *Sandoval* adopted the procedure enacted by the Legislature for all *Cunningham* resentencings. The court concluded that "the federal Constitution does not prohibit the application of the revised sentencing process . . . to defendants whose crimes were committed" prior to the date *Sandoval* was decided (July 19, 2007). (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 857; see also *People v. Miller*, *supra*, 164 Cal.App.4th at p. 669.) *Sandoval* explained that a law violates the ex post facto clause of the federal Constitution "only if it is retroactive—

that is, if it applies to events occurring before its enactment—and if its application disadvantages the offender. [Citation.] A retroactive law does not violate the ex post facto clause if it 'does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." ' " (*People v. Sandoval*, *supra*, at p. 853.) Thus, whether a change in the law violates the ex post facto clause is a matter of degree. (*Id.* at p. 854.)

Sandoval further reasoned that removal from the DSL of the provision calling for imposition of the middle term in the absence of aggravating or mitigating circumstances was not intended to, and would not be expected to, increase the sentence for any particular crime. (*People v. Sandoval, supra*, 41 Cal.4th at p. 855.) To the extent the amendment could be viewed as granting the trial court greater discretion to impose an upper term, the revision would also afford the court equally increased discretion to impose the lower term. (*Ibid.*) *Sandoval*'s analysis compels the conclusion that the application of the amended DSL to Duronte likewise does not violate ex post facto principles or his due process rights.

Duronte argues that *Sandoval*'s analysis was dicta, because the issue was decided in the context of resentencings and analysis of whether application of the amended version of the law violated ex post facto principles was unnecessary to the determination of whether Sandoval had been improperly sentenced. "Although dicta of the California Supreme Court does not control our decisions, it 'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic. [Citations.]' [Citation.]" (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.) *Sandoval*'s ex post facto analysis is logical and compelling when considered in light of the pertinent authorities, and compels us to reach the same result.

c. *Contract clause claim.*

Finally, Duronte asserts that application of the amended version of the DSL and the related, amended rules of court to him "detrimentally impaired" his rights under the Contract Clauses of the United States and California Constitutions, which prohibit states from passing laws impairing the obligation of contracts. (U.S. Const., art. I, § 10, cl. 1;

Cal. Const., art. I, § 9.) He argues that when he entered into his plea agreement, any possible future state prison term was controlled by the provisions of section 1170, subdivision (b) and the corresponding rules of court as they existed in 2000. Under those provisions, if he violated the terms of his probation, he could not have been sentenced to the upper term absent specific findings in aggravation, "tempered by a weighing of any factors in mitigation." The changes to the DSL, however, allowed the court to sentence him to the upper term based only upon the court's reasonable exercise of its sentencing discretion. By removing the requirement that the court must articulate and weigh specified circumstances in aggravation and mitigation, he urges, the amendments to the DSL "constructively decreased appellant's bargained for sentencing expectation" and increased his "consideration under the . . . plea agreement."

We are unconvinced. "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767; *People v. Toscano* (2004) 124 Cal.App.4th 340, 344; *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1069.) An argument similar to Duronte's was considered and rejected in *People v. Gipson, supra*, 117 Cal.App.4th 1065. In *Gipson*, the defendant was found guilty of assault with a deadly weapon, and two prior "strike" allegations were found true. He was accordingly sentenced pursuant to the provisions of the "Three Strikes" law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). One of the prior convictions was the result of a 1992 plea bargain that predated enactment of the Three Strikes law. On appeal, Gipson contended that the 1992 plea bargain was a contract between him and the state, which the Legislature could not impair by subsequent enactments. He asserted that the plea agreement incorporated by reference section 667, as it existed in 1992, which provided a recidivist penalty of five years for each prior serious felony, not for a doubling of a future sentence. (*Gipson*, at p. 1069.)

Gipson rejected this argument. It explained that plea bargains are contractual in nature and must be measured by contract law standards, and the government must fulfill any promise that it expressly or impliedly makes in exchange for a defendant's guilty plea. (*People v. Gipson, supra,* 117 Cal.App.4th at p. 1069.) The existing applicable law

is part of every contract, the same as if expressly referred to or incorporated in its terms. (*Ibid.*) " 'Both the United States and California Constitutions contain clauses prohibiting the Legislature from passing laws which impair the obligations in contracts. [Citations.] Although the language of both contracts clauses is facially absolute, it has been determined that their "prohibition[s] must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " [Citation.] Thus, impairment of an existing contract is not necessarily unconstitutional.' [Citation.]" (*Ibid.*) Contracts are " 'deemed to incorporate and contemplate *not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .*' [Citation.]" (*Id.* at p. 1070, italics added.) The purpose of the Three Strikes law, *Gipson* reasoned, is to "promote the state's compelling interest in the protection of public safety and in punishing recidivism." (*Id.* at p. 1070.) *Gipson* concluded, therefore, that the defendant's "contract clause challenge fails. His plea bargain is 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy . . . .' [Citation.] The plea bargain 'vest[ed] no rights other than those which relate[d] to the immediate disposition of the case.' [Citation.] The 1994 amendment to section 667 did not affect the 1992 plea bargain; it did not create or destroy any substantive rights defendant had in the plea bargain. Subsequent to the plea bargain, the Legislature amended the law; defendant committed another crime; defendant became subject to the penalty described in the amended statute. The increased penalty in the current case had nothing to do with the previous case except that the existence of the previous case brought defendant within the description of persons eligible for a five-year enhancement for his prior conviction on charges brought and tried separately." (*Id.* at p. 1070.)

The same is true here. Inherent in Duronte's 2000 plea bargain was the reserve power of the state to amend the law for the public good. Although Duronte argues that the amendment to the DSL was not made in response to a compelling state interest in protecting public safety, we disagree. Laws setting forth punishment for crime and

periods of incarceration are obviously critical to public safety, and the amendment to the DSL was enacted in order to ensure those laws conformed to constitutional principles. Furthermore, the amendment to the DSL at issue here affected Duronte far less than the enactment of the Three Strikes law in *Gipson*. Under both the original and the amended versions of the law, an upper term sentence was possible.

Duronte argues that, *Gipson* is distinguishable because, unlike Gipson, he was not sentenced due to a second, unrelated conviction; instead, his sentence was for the same crime committed in 2000. However, we note that Duronte was told, at the 2000 sentencing hearing, "[I]f you violate the terms of your probation, you could be sentenced to state prison for up to six years, or you could be sent back to the county jail for whatever remains of one year on your case." Duronte stated that he understood. Given this exchange, Duronte expressly understood and agreed that should he violate probation, he could be sentenced to six years. Under these circumstances there can be no merit to his claim that the amendment of the DSL violated his plea bargain.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.